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Supreme Court of the United States

OCTOBER TERM, 1952

MARYLAND CASUALTY COMPANY, *et al., Petitioners,*

versus

GERTRUDE PICARD CUSHING, *et al., Respondents.*

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

SAMUEL B. BASSETT
STEPHEN V. CAREY

BASSETT, GEISNESS & VANCE
811 New World Life Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

No. 498

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Supreme Court of the United States

OCTOBER TERM, 1952

MARYLAND CASUALTY COMPANY, *et al.*, *Petitioners,* vs. GERTRUDE PICARD CUSHING, *et al.*, *Respondents.*	No. 498

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Having been advised that this case has been restored to the docket for re-argument during the October, 1953, term, the undersigned members of the bar of this court respectfully request leave to file an *amicus curiae* brief. We did not learn of the pendency of this case in this court until a few days prior to April 29, 1953, when we were advised by the clerk that it was already under advisement following the original argument on April 27 and 28, 1953.

By letter dated July 1, 1953, counsel for the petitioners and for the respondents were asked to give their consent (Appendix I). Counsel for the respondents consented (Appendix II) Counsel for petitioners declined to give consent (Appendix III).

Our direct interest in the outcome of the case, and our reasons for requesting permission to file our pro-

posed brief, are stated in our letter of July 1, 1953 (Appendix I). Our brief, if allowed to be filed, will present two closely related questions:

(1) There is such a fundamental difference between marine hull insurance and marine liability insurance that cases such as the *City of Norwich,* 118 U. S. 468, concerning hull insurance only have no relevancy whatever in cases involving marine liability insurance only.

(2) The cases starting with *Cooley v. Board of Wardens,* 12 Howard 299, holding that states with the consent of Congress may regulate pilotage and other matters which but indirectly and incidentally affect commerce and navigation justify a state in regulating marine liability insurance which less directly affects such commerce and navigation.

Our case, now in the process of appeal to the Supreme Court of Washington, involves the application of certain provisions of the Insurance Code of California to an action brought by a seaman to recover damages for personal injuries under the maritime law. The applicable provisions of the California Code read:

> "Scope of Code.
>
> "All insurance in this state is governed by the provisions of this Code" (Deering's California Codes—Insurance Vol. 1 Sec. 41).
>
> "Required Provisions of Policy: Construction of Policy
>
> "A policy insuring against losses set forth in subdivision (a) shall not be issued or delivered to any person in this state unless it contains the provisions set forth in subdivision (b). Such policy, whether or not actually containing such provisions,

shall be construed as if such provisions were embodied therein.

"(a) Unless it contains such provisions, the following policy of insurance shall not be thus issued or delivered:

"(1) Against loss or damage resulting from liability for injury suffered by another person other than a policy of Workman's Compensation Insurance.

"(2) Against loss of or damage to property caused by draught animals or any vehicle, and for which the insured is liable.

"(b) Such policy shall not be thus issued or delivered to any person in this State unless it contains all the following provisions:

"(1) A provision that the insolvency or bankruptcy of the insured will not release the insurer from the payment of damages for injuries sustained or loss occasioned during the life of such policy.

"(2) A provision that whenever judgment is secured against the insured in an action brought by the injured person or by his heirs or personal representatives in case death results from the accident, then an action may be brought against the insurer on the policy and subject to its terms and limitations by such judgment creditor to recover on the judgment." Deering's California Codes Insurance, Vol. 2, Sec. 11580.

This California statute and the Louisiana statute immediately involved in the case before the court, are identical in purpose. It seems clear that if the Louisiana statute is condemned as unconstitutional, as petitioners' counsel broadly contend it should be, the California

statute must likewise fall unless the decision of this court is placed on some more restricted ground. We realize that this is not the time or place to make an extended argument. Nevertheless, Rule 27, as we read it, requires that we concisely indicate why we believe our proposed brief will be of assistance to the court:

Concerning the first question stated above:

The majority opinion of the United States Court of Appeals, Fifth Circuit, in this case, 198 F.(2d) 536, found nothing in the Louisiana statute bringing it in conflict with the Federal limitation of liability statute (46 U.S.C. 183-185), as construed by this court in *City of Norwich,* 118 U.S. 468 which case concerned hull insurance only. The dissenting judge rested his dissent largely, if not exclusively, on his conclusion "that no real distinction can be drawn * * * between hull and marine protection and indemnity insurance," 198 F. (2d) 1201. Counsel for petitioners, in support of their main contention that marine liability insurance, even with the express consent of Congress as given by the McCarran Act of 1945, cannot be made subject to state regulation, reiterate that statement of the dissenting judge (see brief for petitioners, Pages 7 and 12-13). Respondents' counsel, while not agreeing that hull insurance and marine liability insurance are undistinguishable when considered in connection with the Federal limitation of liability statute, 46 U.S.C. 183-185, have not, we think, examined that vital question to the extent that it merits. We believe that is can be demonstrated that there is a great and controlling distinction between hull insurance taken out and paid for by the ship owner exclusively for the protection of his own

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investment, and marine liability insurance intended for the protection of the public, including injured seamen. In this connection, see *Merchants Mutual Automobile Liability Insurance Company v. Smart,* 267 U.S. 126, which involved the vaiidity of Section 109 of the New York Insurance Code. That section of the New York Code has been sustained by the Court of Appeals of New York as applied to marine liability insurance, *Hansen v. Continental Insurance Company,* 262 N.Y. 136, 186 Northeastern 420. Section 109 of the New York Code and Section 11580 of the California Code are practically identical. To give effect to the Louisiana Code or the New York Code or the Califoria Code as applied to marine liability insurance, does not run counter to the purposes of the Federal limitation of liability statute. The purpose of that statute is not to defeat claims of creditors further than may be necessary to afford ship owners relief to the extent that the limitation statute itself prescribes. To permit an injured seaman to recover from a compensated marine liability insurer, extinguishes his claim and to that extent, increases the limitation fund available to other creditors. Nothing is drained away from the ship owner.

As to the second and related question, we believe there are some decisions of this court, not cited in the briefs of counsel, which should be considered. Among these is *Anderson v. Pacific Coast SS Co.,* 225 U. S. 187.

Petitioners' counsel, in their brief, first contend that the Louisiana statute, by its very terms, does not apply to marine liability insurance. Respondents' counsel say that as construed by the courts of Louisiana, that

statute does extend to marine insurance. If the court agrees with the petitioners on that question, we assume it will go no further and will decline to consider and decide grave constitutional questions not necessary to a disposition of the case. If the court holds that the Louisiana statute is not operative in the case at bar, solely because of the injunction issued in the limitation of liability proceeding, possibly the other more fundamental questions raised by the petitioners may not require decision. But if the court goes beyond those limited questions, then clearly the constitutional validity of the McCarran Act of 1945, as well as important provisions of the insurance codes of several states, will become involved.

In their letter declining consent to our filing our proposed brief, petitioners' counsel state that their reason for withholding consent is that the primary question in the case at bar arises from the fact that a limitation of liability proceeding in admiralty was pending when the actions at law against the marine liability carrier were commenced. However, in their brief, they broadly contend that in any event, the McCarran Act of 1945 and the Louisiana statute are both unconstitutional if construed as applicable to marine liability insurance, and that contention is insisted upon irrespective of the injunction in the limitation proceeding.

If petitioners' counsel now disclaim any intention of attacking the constitionality of the McCarran Act or the application of the Louisiana statute for any reason except only the pendency of a limitation of liability proceeding in admiralty, that disclaimer should be

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made expressly and unequivocally to the court prior to the reargument. In the absence of such an explicit disclaimer, we believe we should be permitted to be heard, for the decision in this case, depending on the grounds on which it is put, may well be decisive for or against our client.

July 27, 1953.

Respectfully submitted,

.....

SAMUEL B. BASSETT

.....

STEPHEN V. CAREY

BASSETT, GEISNESS & VANCE
811 New World Life Building,
Seattle 4, Washington.

CERTIFICATE

I hereby certify that a copy of the above motion was mailed to James J. Morrison, Esq., 1014 Pere Marquette Building, New Orleans 12, Louisiana, and to Eberhard P. Deutsch, Esq., Hibernia Bank Building, New Orleans 12, Louisiana, this ..... day of July, 1953.

.....

STEPHEN V. CAREY

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APPENDIX I

[Letterhead omitted]

July 1, 1953

JAMES J. MORRISON, Esq.
Pere Marquette Building
New Orleans 12, Louisiana

EBERHARD P. DEUTSCH, Esq.
Hibernia Bank Building
New Orleans 12, Louisiana

Re: Maryland Casualty Company
v. Cushing

Gentlemen:

We have previously had some correspondence with both you gentlmen concerning our interest in this case.

We represent a seaman who several years ago sustained serious injuries in the course of his employment aboard a vessel owned by a Delaware corporation and operated between Seattle and ports in Southeastern Alaska. That operator having discontinued doing business here, we found it necessary to bring suit in the United States District Court for the District of Delaware. That court gave judgment for the plaintiff in the sum of $25,000.00. Because of the insolvency of the judgment debtor, suit was brought on that Delaware judgment in the Superior Court of King County, Washington, against an insurance company which had written a policy of marine liability insurance. That policy was issued and delivered in the State of California. The Insurance Code of California contains a provision (Deering's California Codes Insurance, Vol 2, Section 11580) which, in its main features, is similar to the section of the Louisiana Insurance Code involved in your case.

Our case is now in the process of appeal to the

Supreme Court of Washington. We have examined your briefs and it appears that if the United States Supreme Court sustains the petitioner's contentions as broadly as they are made its decision may, and probably will, adversely affect our client by holding that the California statute on which we rely cannot constitutionally extend to the regulation of marine liability insurance. Hence, we feel justified in asking your consent that we be permitted to file an amicus curiae brief. This request is made in compliance with Rule 27 of the United States Supreme Court. Our brief, if allowed to be filed, will present two closely related questions:

(1) There is such a fundamental difference between marine hull insurance and marine liability insurance that cases such as the *City of Norwich,* 118 U.S. 468, concerning hull insurance only have no relevancy whatever in cases involving marine liability insurance only.

(2) The cases starting with *Cooley v. Board of Wardens,* 12 Howard 299, holding that states with the consent of Congress may regulate pilotage and other matters which but indirectly and incidentally affect commerce and navigation justify a state in regulating marine liability insurance which less directly affects such commerce and navigation.

The judgment which our client obtained in the United States District Court in Delaware, with accumulated interest, now amounts to upwards of $28,000.00. We believe you will agree that we are not attempting to intrude into a case with which we have no real concern.

May we request that you promptly advise us whether or not you are agreeable to our filing our proposed brief.

Very truly yours,

BASSETT, GEISNESS & VANCE
By Samuel B. Bassett

SBB:y

APPENDIX II

[Letterhead omitted]

July 8, 1953

BASSETT, GEISNESS & VANCE, Esqs.
New World Life Building
Second and Cherry
Seattle 4, Washington

Gentlemen:

Re: Maryland Casualty Company, *et als*
vs. Gertrude Picard Cushing, *et al*
No. 498 Supreme Court of the United
States October Term. Our Ref.: 812A

I have your letter of July 1 addressed jointly to me and to Eberhard P. Deutsch, Esq., pursuant to Rule 27 of the Rules of the Supreme Court requesting permission to file a brief amicus curiae with the United States Supreme Court in the above case.

Please be advised that permission, so far as Appellees are concerned for you to file a brief amicus curiae in this matter, is granted.

Very truly yours,

JAMES R. MORRISON.

APPENDIX III

[Letterhead omitted]

July 6, 1953

Gentlemen:

Attention: SAMUEL B. BASSETT, Esq.

Re: Maryland Casualty Company vs. Cushing

Receipt is acknowledged of your letter of July 1, with reference to a brief amicus curiae which you propose to file in the above matter.

From the description which you give, it appears that the case in which you are interested concerns a single claim for personal injury, has no reference to any limitation-of-liability proceeding involving multiple claims for both personal injury and property damage, and is concerned with only one minor aspect of the manifold problems at issue in the Cushing action.

The vital, primary question in the latter case—the constitutional power of a state to affect the intended, nationally uniform, operation of the federal Limited-Liability Act, by local legislative provision for draining away shipowners' insurance protection through litigation outside a pending limitation proceeding, of multiple maritime claims for both personal injury and property damage—is not present in your case at all.

Accordingly, it occurs to us that any brief written from your point of view might tend to divert attention from, rather than to clarify, the real issues in the Cushing case.

We accordingly prefer not to consent to the filing of such a brief, and trust that you will understand our position.

Sincerely,

DEUTSCH, KERRIGAN & STILES.

MESSRS. BASSETT, GEISNESS & VANCE,
New World Life Building,
Seattle 4, Washington.
cc—James J. Morrison, Esq.